

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY
10/26/2001

*** FILED ***
11/12/2001
CLERK OF THE COURT
FORM L000

HONORABLE MICHAEL D. JONES

P. M. Espinoza
Deputy

LC 2001-000319
Docket Code 512 Page 1
FILED: _____

STATE OF ARIZONA
v.
DAVID JOSEPH COSTA

GARY L SHUPE

JOSEPH W CHARLES

PHX CITY MUNICIPAL COURT
REMAND DESK CR-CCC

MINUTE ENTRY

PHOENIX CITY COURT

Cit. No. #5850920

Charge: 1. DUI
2. DRIVING WITH AN AC OF .10% OR MORE
3. FAIL TO OBEY TEMP MARKERS

DOB: 06/20/64

DOC: 10/04/00

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

This matter has been under advisement since its assignment on October 17, 2001. This decision is made within 30 days as required by Rule 9.8, Maricopa County Superior Court Local Rules of Practice. This Court has considered the record of the proceedings from the Phoenix City Court, and the Memoranda submitted by counsel.

Appellant complains that the trial court erred in admitting the results of an intoxilyzer breath test because the police did not follow a 20-minute period of deprivation prior to the test and failed to follow a "operational checklist". Appellant has attached as exhibit 1 to his Memorandum a transcript of the proceedings before and Administrative Law Judge involving Appellant. This transcript is not evidence in this case, nor can it be considered by this Court. This Court is limited to consideration of the record before the Phoenix City Court. Appellant's contentions essentially involved the question of sufficiency of the evidence to satisfy the foundational requirements of A.R.S. Section 28-1323(A), for the admissibility of an intoxilyzer breath test. When reviewing the sufficiency of the

evidence, an appellate court must not re-weigh the evidence to determine if it would reach the same conclusion as the original trier of fact.¹ All evidence will be viewed in a light most favorable to sustaining a conviction and all reasonable inferences will be resolved against the Defendant.²

If conflicts in evidence exists, the appellate court must resolve such conflicts in favor of sustaining the verdict and against the Defendant.³ An appellate court shall afford great weight to the trial court's assessment of witnesses' credibility and should not reverse the trial court's weighing of evidence absent clear error.⁴ When the sufficiency of evidence to support a judgment is questioned on appeal, an appellate court will examine the record only to determine whether substantial evidence exists to support the action of the lower court.⁵ The Arizona Supreme Court has explained in *State v. Tison*⁶ that "substantial evidence" means:

More than a scintilla and is such proof as a reasonable mind would employ to support the conclusion reached. It is of a character which would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed. If reasonable men may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial.⁷

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¹ *State v. Guerra*, 161 Ariz. 289, 778 P.2d 1185 (1989); *State v. Mincey*, 141 Ariz. 425, 687 P.2d 1180, cert.denied, 469 U.S. 1040, 105 S.Ct. 521, 83 L.Ed.2d 409 (1984); *State v. Brown*, 125 Ariz. 160, 608 P.2d 299 (1980); *Hollis v.*

Industrial Commission, 94 Ariz. 113, 382 P.2d 226 (1963).

² *State v. Guerra*, supra; *State v. Tison*, 129 Ariz. 546, 633 P.2d 355 (1981), cert.denied, 459 U.S. 882, 103 S.Ct.

180, 74 L.Ed.2d 147 (1982).

³ *State v. Guerra*, supra; *State v. Girdler*, 138 Ariz. 482, 675 P.2d 1301 (1983), cert.denied, 467 U.S. 1244, 104 S.Ct.

3519, 82 L.Ed.2d 826 (1984).

⁴ In re: Estate of Shumway, 197 Ariz. 57, 3 P.3rd 977, review granted in part, opinion vacated in part 9 P.3rd 1062;

Ryder v. Leach, 3 Ariz. 129, 77P. 490 (1889).

⁵ *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 961 P.2d 449 (1998); *State v. Guerra*, supra; *State ex rel. Herman v.*

Schaffer, 110 Ariz. 91, 515 P.2d 593 (1973).

⁶ SUPRA.

⁷ *Id.* At 553, 633 P.2d at 362.

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This Court finds that the trial court's determination was not clearly erroneous and was supported by substantial evidence.

IT IS ORDERED affirming the judgment of guilt and sentences imposed by the Phoenix City Court.

IT IS FURTHER ORDERED remanding this matter back to the Phoenix City Court for all future proceedings.